

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
The Status of Competition in the Market for the)	MB Docket No. 16-247
Delivery of Video Programming)	

REPLY COMMENTS OF INCOMPAS

Angie Kronenberg
Christopher L. Shipley
INCOMPAS
1200 G Street NW
Suite 350
Washington, D.C. 20005
(202) 872-5745

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INCOMPAS, by its undersigned counsel, submits these reply comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) *Public Notice* soliciting data, information, and comment on the state of competition in the delivery of video programming for the Commission’s Eighteenth Report.¹

I. INTRODUCTION & SUMMARY

INCOMPAS is the preeminent national industry association for providers of Internet and competitive communications network services. INCOMPAS represents companies that provide residential broadband Internet access service (“BIAS”), as well as other mass market services, such as linear multichannel video programming distribution (“MVPD”) and voice services in urban, suburban, and rural areas. Most INCOMPAS members distributing video programming to residential subscribers are broadband providers that have entered the video marketplace to compete with other providers and to achieve higher broadband adoption rates. INCOMPAS also represents online video distributors (OVDs) that offer video programming over BIAS to consumers. In its Reply Comments, INCOMPAS examines issues that impede smaller MVPDs and new entrants’ access to video programming, with a focus on retransmission consent and the

¹ *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, Public Notice, MB Docket No. 16-247 (Aug. 5, 2016) (“Public Notice”).

role that contractual exclusivity provisions play in limiting the ability of these companies to access multiple dwelling units (“MDUs”) and provide a competing video service product. In addition to these Reply Comments, we incorporate by reference our filings in the Commission’s proceeding to introduce competition to the retail market for navigation devices.² As we stated in that rulemaking, Commission action to ensure that consumers can use third-party devices to access content will promote video choice and consumer benefits.

II. ROBUST WIRELINE BROADBAND COMPETITION AND DEPLOYMENT DEPENDS ON COMPETITIVE NETWORK PROVIDERS’ ABILITY TO PROCURE THE RIGHTS TO AND DELIVER VIDEO PROGRAMMING.

The Commission has long recognized that consumers prefer to purchase broadband and linear video services together in a bundled product.³ In an effort to be competitive in the residential broadband marketplace, competitive network providers, typically new entrants and smaller MVPDs, must provide competitive linear video services—not just broadband services—to compete head-to-head with other residential wireline providers and to achieve higher broadband adoption rates.⁴ In fact, when smaller service providers offer video programming and

² See INCOMPAS Comments, MB Docket No. 16-42 (filed Apr. 22, 2016) (supporting the Commission’s efforts to promote competition and innovation in the retail navigation device market in order to fulfill the purpose of Section 629 of the Communications Act); *see also* Letter from Christopher L. Shipley, INCOMPAS, to Marlene H. Dortch, FCC, MB Docket No. 16-42 (filed Aug. 2, 2016).

³ See, e.g., FCC, *Connecting America: The National Broadband Plan*, 38 (2010), available at <http://transistion.fcc.gov/national-broadband-plan.pdf>.

⁴ See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 ¶¶ 51, 62 (2006) (“The record here indicates that a provider’s ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.”).

broadband services together, broadband adoption increases by 24 percent.⁵

Obtaining video programming rights is an essential prerequisite to offering linear video service. However, as reported by the Commission in its *Seventeenth Report*, video content costs continue to rise significantly.⁶ Last year, the American Cable Association (“ACA”) submitted data to the Commission demonstrating that over the “last eight years, total programming fees for the U.S. multichannel video industry have more than doubled.”⁷ Moreover, per subscriber programming fees “increased an average of 9.4% a year between 2010 and 2015.”⁸ For smaller MVPDs, the increase in fees has been even greater—10.6%—even excluding regional sports networks and retransmission consent fees.⁹ Likewise, the American Television Alliance (“ATVA”) has reported that retransmission consent fees grew 8,600% between 2005 and 2012.¹⁰ Even the Commission’s most recent study of the average annual total amount paid for

⁵ COMPTTEL, ITTA, NTCA Letter to Senator John Thune, Chairman, Senate Committee on Commerce, Science, and Transportation, June 22, 2015, *available at* <http://www.ntca.org/images/stories/Documents/videohearingletter.pdf> (explaining that “[a]ccess to video services drives broadband adoption, which in turn helps to justify the business case for broadband deployment”).

⁶ *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventeenth Report, MB Docket No. 15-158, ¶ 56 (May 6, 2016) (reporting that, according to SNL Kagan, programming costs rose 16.5 percent from 2012 to 2014).

⁷ Comments of the American Cable Association, MB Docket No. 15-158, High and Increasing Video Programming Fees Threaten Broadband Deployment Research Paper, at 5 (Aug. 21, 2015) (“ACA Research Paper”).

⁸ *Id.*

⁹ *Id.*

¹⁰ ATVA *et. al* Ex Parte Notice, MB Docket No. 10-71 (July 17, 2015) (*citing* SNL Kagan, *Broadcast Investor Deals & Finance: Retrans Projections Update: \$10.3B by 2021*, June 30, 2015 (“SNL Kagan June 30, 2015”)).

retransmission consent by an MVPD showed an increase of 63.2 percent, from \$7.8 million in 2013 to \$12.7 million in 2014.¹¹

ACA's research predicts that while programming fees will continue to grow rapidly in the future,¹² retail prices for video subscribers likely will be more constrained due to direct MVPD competition and availability of OVDs.¹³ Due to this squeeze on providers as programming fees increase faster than retail charges, the business case for new broadband deployment in the near future will be even "less tenable" for rural expansion, new fiber deployments, and incumbent telco deployments.¹⁴ Many INCOMPAS members are already offering linear video service at a loss, forfeiting providing a video service entirely, or outsourcing this service, all of which impedes broadband network expansion and upgrades.

INCOMPAS members have found that their struggle to secure access to video content at affordable rates and under reasonable terms mirrors the experience of members of ITTA, NTCA – The Rural Broadband Association, and WTA. In its comments in this proceeding, ITTA criticized the "helium-infused trajectory of retransmission consent fees" and reported that its members have faced cost increases of 77 percent annually since 2008.¹⁵ Similarly, a survey

¹¹ See *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, MM Docket No. 92-266, ¶ 25 (Oct. 12, 2016).

¹² ACA Research Paper at 5. Similarly, SNL Kagan estimates that TV broadcasters' retransmission consent fees will reach \$10.3 billion by 2021 compared to the projected level of \$6.3 billion in 2015. SNL Kagan June 30, 2015.

¹³ ACA Research Paper at 6.

¹⁴ *Id.* at 9.

¹⁵ Comments of ITTA – The Voice of Mid-Sized Communications Companies, MB Docket No. 16-274 (filed Sep. 21, 2016) ("ITTA Comments"), at 4-5.

conducted by NTCA of its members found that the increase in retransmission consent fees and programming costs has led nearly all respondents to pass along those costs to subscribers with an average per subscriber cost increase of \$5.78 per month.¹⁶ WTA has previously indicated that its members' network upgrades have not affected favorably their abilities to compete given their inability to secure reasonable rates for video programming.¹⁷

Even for large companies, the provision of video services can be a loss leader and has been a material factor in industry consolidation and recent mergers. AT&T cited this challenge as a circumstance that significantly influenced its acquisition of DirecTV¹⁸, and Time Warner Cable and Charter recognized that high programming costs have a negative impact on broadband deployment.¹⁹

¹⁶ See Comments of NTCA – The Rural Broadband Association, MB Docket No. 16-274 (filed Sep. 21, 2016) (“NTCA Comments”), at 4.

¹⁷ WTA Comments, MB Docket No. 15-158, at 2 (Aug. 21, 2015).

¹⁸ See Statement of Randall Stephenson, Chairman, CEO, and President, AT&T, Inc., The AT&T/DIRECTV Merger: The Impact on Competition and Consumers in the Video Market and Beyond: Examining the Comcast-Time Warner Cable Merger And The Impact On Consumers: Hearing Before the S. Judiciary Comm., Subcomm. on Antitrust, Competition Policy and Consumer Rights, 113th Cong. at 3 (June 24, 2014), *available at* <http://www.judiciary.senate.gov/download/06-24-14-stephenson-testimony>; *see also Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd. 9131, at ¶ 3 (2015) (“With fewer than 6 million subscribers, AT&T’s video product is hampered by higher costs of procuring programming—limiting its ability to both offer lower consumer prices and expand its high-speed broadband footprint.”).

¹⁹ See *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations*, Public Interest Statement, MB Docket No. 15-149 (June 25, 2015) (“Even as robust competition and consumer demand have driven each Applicant to invest many billions of dollars to expand and upgrade their broadband networks, the profitability of each Applicant’s video business has declined significantly in recent years – a trend that is expected to continue, in light of video programming costs that have increased at a rate that far exceeds the growth in MVPDs’ revenues.”).

A joint survey conducted by INCOMPAS and NTCA in late 2015 (“2015 Video Competition Survey”) illustrates the challenges smaller MVPDs and new entrants face in order to compete effectively in the video programming market. The survey captured quantitative data regarding members’ provision of video service and experiences negotiating to obtain carriage rights for broadcast channels.²⁰ Ninety-five percent of survey respondents indicated that lack of access to reasonably priced programming is the single biggest barrier to providing video service.²¹ Seventy-two percent of respondents have considered eliminating certain broadcast and/or non-broadcast programming and/or refrained from entering the MVPD market altogether due to rising programming costs.²² Forty percent of respondents reported that they faced an increase in retransmission consent fees of more than 100% (with 11% reporting increases of more than 200%) during the current contract cycle in comparison to the previous contract cycle.²³ Similarly, 79% of respondents reported an increase of 20% or less for non-broadcast programming fees from the previous contract cycle to the current contract cycle.²⁴ These cost increases are extreme when compared to the growth in the Consumer Price Index (which grew 0.2% over the last year) and are well in excess of inflation over the course of the previous

²⁰ See NTCA’s and INCOMPAS’s 2015 Video Competition Survey at 3 (Oct. 30, 2015), www.incompas.org/files/The%20RuralBroadbandAssociationandINCOMPAS2015VideoCompetitionSurvey.pdf (“2015 Video Competition Survey”). A total of 226 companies participated in the survey. Survey results can be estimated to be accurate within +/-6% at the 95% confidence level.

²¹ *Id.* at 3.

²² *Id.* at 2.

²³ *Id.* at 3.

²⁴ *Id.*

contract cycle. While INCOMPAS's and NTCA's members historically have absorbed these costs to remain competitive in the marketplace and keep consumers' costs low, such dramatic increases in video programming costs pose a long-term threat to the viability of these providers' video operations, and thus to their broadband operations. Moreover, these providers' abilities to upgrade their networks and deploy additional competitive broadband services are compromised.

To promote broadband deployment and consumer choice, the Commission must ensure that video competition is possible. The Commission's own data concerning availability of wireline broadband network options for residential BIAS suggests that only 38 percent of households have just two provider choices (typically, the incumbent cable provider and incumbent telco). Fifty-one (51) percent of households have the option of obtaining service only from a single provider—in other words, no competitive choice.²⁵ The Commission has recognized the importance of “removing barriers to investment and lowering the costs of broadband build-out.”²⁶ To enable broadband providers to compete head-to-head on linear video service to attract consumers to broadband service, the Commission should address the ease with which smaller MVPDs and new entrants can gain access to video programming. INCOMPAS believes the Commission can best do so by examining the retransmission consent regime.

²⁵ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 201 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, GN Docket No. 15-191, ¶ 86 (Jan. 29, 2016).

²⁶ Hearing on Oversight of the Federal Communications Commission: Before the Subcomm. on Commc'ns and Tech. Comm. on Energy and Commerce, 114 Cong. 4 (2014) (statement of FCC Chairman Tom Wheeler).

a. Last Minute Negotiations and Other Anticompetitive Practices Used To Obtain Retransmission Consent Harm the Market for Delivery of Video Programming.

Video programming prices and retransmission consent negotiation practices make it particularly difficult for INCOMPAS members to offer content in competitive retail packages that reflect what consumers want and can afford. To enable providers to secure video programming at reasonable and non-discriminatory rates, terms, and conditions, the Commission must address long-standing concerns over how retransmission consent agreements are negotiated. Smaller MVPDs and new entrants lack the scale or bargaining leverage to secure access to broadcast programming at sustainable rates. The Commission's decision not to adopt changes to the good faith negotiation rules after amassing a robust record detailing problematic practices was disappointing for INCOMPAS members.²⁷ As discussed in NTCA's and ITTA's comments, smaller providers and new entrants have continued to face unreasonable negotiation tactics by broadcasters.²⁸

INCOMPAS members have been subject to several of these same practices over the last year.²⁹ For instance, perhaps emboldened by the Commission's insistence that changes to the

²⁷ See FCC Chairman Tom Wheeler, *An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules*, FCC Blog (July 14, 2016, 10:37 AM), <https://www.fcc.gov/news-events/blog/2016/07/14/update-our-review-good-faith-retransmission-consent-negotiation-rules> (signaling that the Commission would not revise or update the existing rules related to the totality of the circumstances test for retransmission consent).

²⁸ See ITTA Comments at 5, 7; *see also* NTCA Comments at 10-11, 13.

²⁹ INCOMPAS detailed several of the harmful negotiation practices its members experienced in retransmission consent negotiations, including stall tactics and forced tiering and bundling, in its comments in the Commission's review of the retransmission consent totality of the circumstances test. *See* Comments of INCOMPAS, MB Docket No. 15-216 (filed Dec. 1, 2016), at 11-14.

good faith negotiating framework are unnecessary, INCOMPAS members have faced last-minute renewal proposals with an intractable set of terms and conditions one to two months before the current agreement expires. Faced with imminent expiration of a current agreement, most MVPDs are left with insufficient time to negotiate complex terms about technology and rates in an evolving video market. Instead, MVPDs end up capitulating to higher prices and less favorable terms to avoid a blackout. As the Commission is aware, given the relative size of INCOMPAS's members providing video service, as well as their status as new competitive entrants, any loss of programming could harm subscribership to their video and broadband services. As such, small providers lack the luxury of waiting until an impasse to allege a breach of the duty to negotiate in good faith, and oftentimes lack the resources or time to bring a complaint to the FCC.

Commission action is still warranted to improve retransmission consent with respect to competitive video providers. INCOMPAS stands by its proposal in the good faith proceeding for a longer negotiation window with set times for presenting key terms of the agreement.³⁰ Requiring a six-month window for negotiations would reasonably ensure that both sides can conduct bona fide negotiations with sufficient time to discuss contract terms and present alternate proposals. In addition, the Commission should find that refusal of the parties to engage in regular discussions of the proposed agreement would violate the good faith standard. Having a clear start date for negotiations and requiring regular communication should provide the necessary lead-time for the parties to come to an agreement and prevent an impasse.

³⁰ *Id.* at 11-12.

To ensure that both parties can engage in a robust series of negotiations once the proposal has been delivered, the renewal proposal provided by the broadcasters also should include the material terms of the renewal long-form agreement, including a justification for any proposed rate increases based on direct and legitimate economic factors.³¹ This will increase the likelihood that parties will reach a new agreement and provides the parties with an opportunity to seek regulatory relief at the Commission for a breach of the duty to negotiate in good faith, well in advance of the current agreement's expiration date if negotiations falter.

III. INCUMBENTS' CONTRACTUAL EXCLUSIVITY PROVISIONS LIMIT SMALL MVPD AND NEW ENTRANT ACCESS TO MDUs.

Several INCOMPAS members have indicated that their efforts to expand their BIAS and video service footprints have been frustrated by an inability to secure access to MDUs. Incumbents have used a number of contractual methods to stymie the deployment of competitive video and BIAS services to MDUs, including exclusive marketing agreements and revenue sharing demands. In 2010, the Commission reaffirmed its rules permitting MVPDs to enter into marketing arrangements with MDU owners, giving these video service providers exclusive rights to advertise their service in the building's common areas, website, and new resident materials.³² However, incumbent cable providers and property owners have contorted these arrangements in order to outright deny MDU access to competitive broadband providers with video service

³¹ See generally ITTA Ex Parte Notice in MB Docket No. 10-71 (Aug. 18, 2015) (proposing that it be a *per se* violation for broadcasters to “[d]iscriminate in price among MVPDs in a market unless the broadcaster can demonstrate that there are direct and legitimate economic benefits associated with charging different prices to different MVPDs”).

³² See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Second Report and Order, 25 FCC Rcd 2460, ¶¶ 29-30 (2010).

offerings. In other situations, property owners have demanded revenue sharing arrangements with competitive providers. Competitive broadband and video providers that are unable or unwilling to participate in this kickback scheme are denied access to MDUs.

Moreover, wiring exclusivity arrangements have allowed incumbent MVPDs to prevent utilization of existing inside wiring even after a customer has ceased service and the provider is required by law to either make the wiring available to another MVPD or remove it.³³

Incumbents will enter into an agreement with MDUs to lease this fallow wiring on an exclusive basis, forcing competitive providers into the difficult position of having to choose between installing duplicative in-unit wiring or not serving the building at all. As explained by ITTA in its comments, this access “is required by law to ensure that consumers in apartment buildings and similar places can obtain video service from a competing provider.”³⁴

The net impact of these practices is that deployment of competitive broadband and video service is discouraged and MDU residents are denied alternatives for video and BIAS services. INCOMPAS urges the Commission to re-examine these issues and ensure that these methods are not being used to erect artificial barriers to broadband and video competition.

IV. CONCLUSION

The Commission should address the high barriers to video and broadband competition by examining the access that small MVPDs and new entrants have to video content. Under the current retransmission consent framework, these providers have a difficult time securing video programming at affordable rates and under reasonable terms and conditions. The practice of

³³ 47 CFR § 76.802(a).

³⁴ ITTA Comments at 9 (referencing 47 CFR § 76.2000).

delivering material terms and conditions at the last minute is regularly employed to compel smaller providers, like INCOMPAS members, to concede to higher prices and less favorable terms in retransmission consent negotiations. Moreover, incumbents have used exclusive marketing agreements and other access denying methods with MDU owners and property owners to deny small MVPDs and new entrants from accessing facilities to provide competitive video programming and BIAS services. Wireline broadband competition is intertwined with the availability of video programming, and the Commission must address these long-standing issues in order to promote both video and broadband competition.

Respectfully submitted,

INCOMPAS

/s/ Christopher L. Shipley

Angie Kronenberg
Christopher L. Shipley
INCOMPAS
1200 G Street NW
Suite 350
Washington, D.C. 20005
(202) 872-5745

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